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No. 87-138

In the Supreme Court of the United States

OCTOBER TERM, 1987

VINCENT NICOLOSI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in upholding the IRS's assessment of the $500 "frivolous return" penalty under Section 6702 of the Internal Revenue Code[1] for filing a Form 1040 containing a statement of constitutional objection, rather than financial information.

1. Each petitioner filed a Form 1040 for the 1983 tax year that provided only his name, address, social security number, and the amount of estimated taxes paid or the amount applied from the 1982 return (Line 58). All the remaining line items, except one, were left blank. The space provided for miscellaneous income contained the words "Fifth and Sixth Amendments to Constitution." The purported returns thus contained no financial information regarding income or deductions from which tax liability could be computed, nor did they specify any asserted

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code).

tax liability. The purported returns, including the statement of constitutional objection, were not signed under penalty of perjury, nor verified in any other manner. C.A. App. 11-12, 25; C.A. Supp. App. 17-18.

The Internal Revenue Service determined that petitioners' purported returns fell within the scope of the "frivolous return" penalty provision of Section 6702 of the Code and assessed the $500 penalty against each taxpayer. Pursuant to Section 6703(c) of the Code, each petitioner paid 15% of the penalty ($75) and filed an administrative claim for refund. Following the Commissioner's failure to grant those refund claims, petitioners brought the instant refund suits, which were consolidated in the United States District Court for the District of New Jersey. C.A. App. 1-3; C.A. Supp. App. 2 (Entries 1 & 7).

The government moved for summary judgment, and petitioners filed a response in which they attempted to justify their invocation of the Fifth Amendment privilege on their tax returns by asserting that they either had been previously convicted of, charged with, or were under investigation for, certain crimes (see Pet. 3; C.A. App. 24). After a hearing, the district court granted the government's motion for summary judgment and awarded costs and attorney's fees to the government pursuant to Rule 11 of the Federal Rules of Civil Procedure (Pet. App. 3a-4a; C.A. App. 21-41). The court orally explained in rejecting petitioners' arguments that, particularly in light of the fact that the Forms 1040 were not signed and most items were simply left blank, the Fifth Amendment privilege had not properly been invoked (C.A. App. 34-40). The court stated that, even if they had a legitimate claim of privilege with respect to some questions, petitioners could not have had "even a colorable claim [not] to answer such questions as whether they are married or single and how many exemptions they have or don't have,

what their spouse's Social Security number is" (*id.* at 38). The court of appeals affirmed by judgment order (Pet. App. 1a).[2]

2. Petitioners contend that the courts below erred in affirming the imposition of frivolous return penalties against them, arguing that their returns constituted a valid assertion of the Fifth Amendment privilege against self-incrimination. This contention is wholly without merit. Indeed, the Forms 1040 filed by petitioners and the legal contentions they make here are virtually identical to those involved in *Leogrande* v. *United States*, 811 F.2d 147 (2d Cir. 1987), cert. denied, No. 86-1807 (Oct. 5, 1987). There is no more reason for the Court to grant certiorari here than there was in *Leogrande*.

Section 6702(a) of the Code provides for the imposition of a $500 penalty upon an individual who files an income tax return or purported return that fails to "contain information on which the substantial correctness of the self-assessment may be judged" if such conduct is due to "a position which is frivolous * * *." Here, petitioners basically left their Forms 1040 blank, except for identifying information, purporting to raise a constitutional privilege with respect to one line item. Moreover, petitioners did not sign or verify the purported returns, as required by Section 6065 and by Form 1040 itself, nor did petitioners explain or verify their assertion of constitutional privilege. See *Borgeson* v. *United States*, 757 F.2d

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[2] Only petitioner Nicolosi filed a notice of appeal from the district court's decision (C.A. Supp. App. 2; see *id.* at 1-8). Thus, the court of appeals lacked jurisdiction to review the decisions against Glen Brown, Philip Lombardo, and Richard DeLuca, and it did not purport to do so (see Pet. App. 1a). Accordingly, although those latter three individuals are named as petitioners, they are not properly before this Court. In any event, their cases are indistinguishable from that of petitioner Nicolosi (see C.A. App. 24-25).

1071 (10th Cir. 1985). The legislative history of Section 6702 makes clear that the "frivolous return" penalty was meant to apply to returns "in which many or all of the line items are not filled in except for reference to spurious constitutional objections." S. Rep. 97-494, 97th Cong., 2d Sess. 278 (1982). Thus, petitioners' Forms 1040 plainly fell within the ambit of Section 6702, and the IRS's imposition of the "frivolous return" penalty was amply justified.

Petitioners' assertion of constitutional privilege on their purported returns does not alter this result. Consistent with decisions of this Court,[3] the courts of appeals have uniformly rejected the notion that a taxpayer may refuse to provide any financial information at all on a tax return by blanket assertion of a Fifth Amendment privilege. See, *e.g.*, *Eicher* v. *United States*, 774 F.2d 27, 29 (1st Cir. 1985); *United States* v. *Schiff*, 612 F.2d 73, 77, 83 (2d Cir. 1979); *United States* v. *Edelson*, 604 F.2d 232, 234-235 (3d Cir. 1979); *Moore* v. *Commissioner*, 722 F.2d 193, 195 (5th Cir. 1984); *United States* v. *Heise*, 709 F.2d 449, 451 (6th Cir.), cert. denied, 464 U.S. 918 (1983); *United States* v. *Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *Ueckert* v. *Commissioner*, 721 F.2d 248, 250 (8th Cir. 1983); *United States* v. *Neff*, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *United States* v. *Brown*, 600 F.2d 248, 251-252 (10th Cir.), cert. denied, 444 U.S. 917 (1979); *Ricket* v. *United States*, 773 F.2d 1214 (11th Cir. 1985).

In any event, petitioners obviously have not made a sufficient showing to justify any invocation of the privilege in connection with their tax returns, much less a blanket refusal to supply any financial information at all. The bare fact that there are criminal proceedings pending against a claimant, or that he was once convicted of a crime, is not

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[3] See, *e.g.*, *Garner* v. *United States*, 424 U.S. 648, 651 (1976); *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965); *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

enough to invoke the privilege; there must be a nexus between the risk of conviction and the information requested. See *Martin-Trigona* v. *Gouletas*, 634 F.2d 354, 360 (7th Cir.), cert. denied, 449 U.S. 1025 (1980). Here, petitioners' representations that they were previously convicted, accused, or suspected of crimes (see Pet. 3) failed to demonstrate that properly completing a tax return would have posed a substantial danger of self-incrimination.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[4] Petitioners present the question whether sanctions under Rule 11 of the Federal Rules of Civil Procedure can ever be imposed in a case that involves an attempt to assert the privilege against self-incrimination (see Pet. i). They present no argument to support their broad contention (Pet. 15), and we are aware of no basis for a principle generally barring the imposition of Rule 11 sanctions in a case like this or for a finding that the district court abused its discretion in imposing sanctions in this particular case.

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